SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART STP

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EFRAIN GALICIA

Index №. 024973/2015

-against-

Hon. DORIS M. GONZALEZ

DONALD J. TRUMP

Justice Supreme Court

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The following papers numbered 1 to 4 were read on this motion (Seq. No. 012) for **QUASH SUBPOENA** noticed on _____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits	No(s). 3, 4
Replying Affidavit and Exhibits	No(s).

Motion is Respectfully Referred to Justice: _____
Dated: _____

Upon the foregoing papers defendants' motion to quash and plaintiffs' cross-motion to compel are decided in accordance with the annexed memorandum opinion.

This constitutes the decision and order of the court.

Dated: 9-20-19

Hon. _____
DORIS M. GONZALEZ, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART X OTHER - cross-mot granted
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART STP

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EFRAIN GAICIA, FLORENCIA TEJEDA PEREZ, GONZALO CRUZ FRANCO, MIGUEL VILLALOBOS and NORBERTO GARCIA, as Administrator of the Estate of JOHNNY HOSVALDO GARCIA ROJAS,

DECISION AND ORDER
Index No. 24973/2015E

Plaintiffs,

-against-

DONALD J. TRUMP, DONALD J. TRUMP FOR PRESIDENT, INC., THE TRUMP ORGANIZATION LLC, KEITH SCHILLER, GURY UHER, EDWARD JON DECK JR AND JOHN DOES 3-4

Defendants.

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HON. DORIS M. GONZALEZ:

Upon the foregoing papers defendants Donald J. Trump and Trump Organization LLC move to quash a subpoena directed at Donald J. Trump, the current sitting president of the United States (hereinafter "President Trump"). In turn, plaintiffs cross-move to compel President Trump to testify at trial via videotaped testimony at a location, date and time of his own choosing. Upon review of the papers, together with the opposition submitted thereto; and after due deliberation, the motions are decided as follows.

FACTS AND PROCEDURAL HISTORY

Plaintiffs commenced this action on or about September 9, 2015, asserting claims for, *inter alia*, assault and battery, stemming from an alleged physical altercation at a protest rally outside of Trump Tower in Manhattan between the defendants' employees and plaintiffs.

As relevant to the instant motion, defendants moved for a protective order early in the litigation to preclude plaintiffs from deposing defendant, then-candidate, Donald J. Trump. Plaintiffs cross-moved to compel the candidate's examination before trial and for the production

of documents. By decision and order dated June 1, 2016, the Honorable Laura G. Douglas granted defendants' motion, issued a protective order, and denied plaintiffs' cross-motion as premature, holding that "this is an ordinary personal injury action," and plaintiffs had not "demonstrated a sufficient basis . . . to compel the examination before trial." Plaintiffs did not seek to reargue that decision, nor did they move again to compel the examination before trial prior to the close of discovery. Plaintiffs filed their note of issue on February 14, 2017, certifying that this matter is ready for trial and all discovery known to be necessary had been completed.

Defendants moved for summary judgment pursuant to CPLR 3212. By decision and order dated August 20, 2018, the Honorable Fernando Tapia granted the motion, in part, dismissing plaintiffs' claims for negligent hiring, retention, and supervision, but permitted plaintiffs' claims for assault, battery and conversion to proceed as against all defendants, including President Trump, under a theory of *respondeat superior*. Justice Tapia held:

> "Defendants motion to disassociate the actions of [Keith] Schiller, [Gary] Uher, and [Edward Jon] Deck from Trump, his namesake company, and his campaign as a matter of law is unavailing. To the contrary, plaintiffs raise ample issues of fact that contrary to moving defendants' claims, tends to exhibit Trump's dominion and control over Schiller, Uher, and Deck."

On December 18, 2018, plaintiffs served a subpoena ad testificandum on the now-President Trump to compel his testimony at trial. Thereafter, this matter was temporarily stayed due to the death of plaintiff Johnny Garcia. Upon substitution, the stay in this matter was lifted on June 21, 2019, and the trial is scheduled for September 26, 2019. The instant order to show cause to quash the subpoena that plaintiffs directed to President Trump, pursuant to CPLR 2304, and plaintiffs' cross-motion to compel, were argued before this Court on September 9, 2019.

DISCUSSION

More than 200 years ago our founders sought to escape an oppressive, tyrannical governance in which absolute power vested with a monarch. A fear of the recurrence of tyranny birthed our three-branch government adorned with checks and balances. Chief Justice John Marshall famously stated "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right" (*Marbury v. Madison*, 1 Cranch 137 [1803]). Put more plainly, no government official, including the Executive, is above the law.

However, the relevant inquiry here is not whether the President is absolved from responsibility for unofficial conduct, as the United States Supreme Court resolved that question unequivocally in *Clinton v Jones* (520 US 681 [1997]). Nor is the inquiry whether this Court may exercise jurisdiction over the President, as that question was recently settled in *Zervos v Trump* (171 AD3d 110 [1st Dept. 2010]). That Court held in no uncertain terms that "the presidency and the President are indeed separable" for civil liability purposes (*id* at 124). The only issue presented by these motions is whether the President's testimony is necessary at trial.

In moving to quash the subpoena defendants contend that the taking of the President's deposition was waived when plaintiffs failed to conduct the examination before trial during the discovery phase of this action. According to defendants, the *Clinton* Court provided a road map for the taking of a sitting President's deposition that requires the testimony to be taken during discovery, at the White House, for use at trial. Further, defendants contend, relying on precedent from the United States Court of Appeals for the Second Circuit, that in order to compel a high-ranking government official to testify at trial, there must be some showing of "exceptional circumstances" and the witness must possess "unique[,] first-hand knowledge related to the

litigated claims" (*see Lederman v New York City Dept. of Parks and Recreation*, 731 F3d 199, 203 [2d Cir 2013]), and President Trump possesses no such knowledge. Finally, defendants posit that Justice Douglas' order is "law of the case" and may not be disturbed.

In opposition to the motion to quash plaintiffs contend there was no waiver; that *Clinton v Jones* did not announce a rigid prescription for how a president may be deposed; and *Lederman* is inapposite. Plaintiffs contend in furtherance of their cross-motion that President Trump's testimony is highly probative as to his personal liability in this matter in light of Justice Tapia's ruling that there are triable issues of fact that must be resolved by a jury.

Plaintiffs' arguments must prevail. Foremost, by failing to appeal or renew their motion to compel before Justice Douglas, plaintiffs affirmatively waived their right to an examination before trial of President Trump. They did not, however, *waive the President's testimony at trial*. Defendants' reliance on *Clinton v Jones* for the proposition that the testimony of a sitting president must be taken at the White House during the discovery phase of litigation is misguided. There, writing for the majority, Justice Stevens observed:

> "We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so"

(*Clinton*, 520 US at 691-92). Respectfully, this remark upon which defendants rely, given that it was prefaced with "we *assume*" (emphasis added) must be interpreted as dicta and not a rigid procedural requirement for the taking of a president's deposition, *de bene esse*. Further, the First Department, which this Court must follow, recently contemplated both the President's involvement during discovery *and* a trial judge deeming the President's participation at trial necessary (*Zervos*, 171 AD3d at 127). In light of the First Department's decision in *Zervos*, this

Court has no choice but to reject defendants' waiver argument, as there is no lawful basis to conclude that the President's testimony may only be taken during discovery.

Second, in *Lederman*, the United States Court of Appeals for the Second Circuit held that "to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition . . ." (*Lederman*, 731 F3d at 203). However, the *Lederman* court was clear that the rule announced therein was born from the principle that "that a high-ranking government official should not—absent exceptional circumstances—be deposed or called to testify regarding the reasons for taking *official action*" (*id.* at 203 [citing *United States v Morgan*, 313 US 409, 414 [1941] [emphasis added]). Whereas President Trump is being called upon to answer for unofficial conduct, the "exception circumstances" doctrine is inapplicable.

Finally, defendants' contention that the decision and order of Justice Douglas is "law of the case" misinterprets that doctrine. "[L]aw of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case" (*People v Evans*, 94 NY2d 499, 504 [2000]). To be clear, nothing herein shall be construed as disturbing or contradicting that order. Justice Douglas deemed plaintiffs' motion to compel an examination before trial – made when discovery was in its infancy – "premature." The instant cross-motion seeks to compel *trial testimony* and circumstances have clearly changed considering Justice Tapia's ruling that questions of fact exist regarding President Trump's exercise of dominion and control over his employee defendants. As the record appears before this Court, President Trump's relationship with the other defendants is now central to plaintiffs' prosecution of their claims under the theory of *respondeat superior*. As such, his testimony is indispensable.

ACCORDINGLY, it is hereby

ORDERED, that the motion (012) by defendant President Donald J. Trump, for an order pursuant to CPLR 2304, quashing a subpoena ad testificandum is DENIED in its entirety; and it is further

ORDERED, that plaintiffs' cross-motion is GRANTED in its entirety; and it is further

ORDERED, that defendant President Donald J. Trump shall appear for a videotaped deposition prior to the trial of this matter and provide testimony for the use at trial.

This constitutes the decision and order of the Court

DATED: 9/20/19

ENTER:

HON. DORIS M. GONZALEZ, J.S.C